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Mark Levensgood

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UNREGISTERED SECURITIES IN THE NATIONAL FOOTBALL LEAGUE: CAN THE SECURITIES ACT OF 1933 PROTECT SEASON TICKET HOLDERS AND PERSONAL SEAT LICENSE HOLDERS?

I. INTRODUCTION

From 1990 to 1999, the National Football League (“NFL”) experienced an unmatched frequency of franchise relocation.¹ NFL franchises hoped to increase revenues by leaving one city behind in favor of another promising a publicly-funded stadium.² Publicly-funded stadiums allow greater profit margins by eliminating financial liability common to privately-owned stadiums and delivering greater revenue through amenities, such as luxury suites and premium seats with personal seat licenses.³

City and state officials seeking to rejuvenate stagnant urban economies were more than willing to oblige franchise owners with lucrative stadium deals.⁴ They believed publicly-funded stadiums would siphon suburban and corporate dollars into urban economies.⁵

1. See Douglas M. Turco & Tony Ostrosky, *Touchdowns and Fumbles: Urban Investments in NFL Franchises*, 1 CYBER-J. SPORT MARKETING 3 (1997), at <http://www.nswis.nsw.gov.au/fulltext/1997/cjsm/v1n3/turco.htm> (discussing economic impetus behind frequent relocation of NFL franchises).

2. See *id.*; see also Charles Babington & Ken Denlinger, *Modell Announces Browns' Move to Baltimore*, WASH. POST, Nov. 7, 1995, at D1 (discussing details of agreement signed by Browns' owner, Art Modell, and Maryland Governor, Parris Glendinning); Terry Monmaney, *Feeling Blue over the Browns; Why Do Sports Fans Such as Cleveland's Become so Distraught when Their Teams Leave Town?*, L.A. TIMES, Jan 27, 1996, at Part-A, Metro Desk (discussing \$200 dollar, publicly-funded stadium built by Maryland Stadium Authority for Cleveland Browns in Baltimore).

3. See Robert Taylor Bowling, Comment, *Sports Aggravated: The Fan's Guide to the Franchise Relocation Problem in Professional Sports*, 28 STETSON L. REV. 645, 650-51 (1999) (discussing economic boom of publicly-funded stadiums to professional sports franchises); see also Turco & Ostrosky, *supra* note 1, at ¶17 (noting publicly-funded stadium essential element to inducing professional sports franchise to relocate). For a discussion of personal seat licenses, see *infra* notes 27-34 and accompanying text.

4. See Turco & Ostrosky, *supra* note 1, at ¶18 (discussing hope of local government officials that attracting professional sports franchises with promise of publicly-funded stadium will revive urban economy).

5. See Bowling, *supra* note 3, at 651-52 (stating uncertainty of economic rejuvenation anticipated from professional sports franchise).

During the 1990s, five NFL franchises relocated and many more considered the possibility of relocation.⁶ Individual NFL franchises departed St. Louis, Cleveland, Houston, and two departed Los Angeles.⁷ Franchises arrived in Phoenix, Oakland, St. Louis, Baltimore, and Nashville.⁸

Fans in cities of departing teams were outraged, especially Cleveland.⁹ Many Cleveland Browns ("Browns") fans experienced deep emotional and psychological trauma.¹⁰ Jean Mitchell, the director of the Cleveland Psychological Association, stated, "[M]any people here look at football not just as sport but as tradition. It has been a bonding process for fathers and sons This has been a way of life for many people for many years."¹¹ Judge Kenneth R. Callahan, a common pleas court judge in Ohio, stated only the outbreak of war could eclipse the "extraordinary public *pathos*" present in Cleveland following the loss of the Browns.¹² The Browns had been in Cleveland for forty-nine years and had the fourth best attendance record in the history of the NFL.¹³

Considering the deep tradition and attachment to the Browns, it is not surprising certain Browns season ticket holders pursued legal action against the relocating franchise.¹⁴ Specifically, the season ticket holders asserted breach of contract and fraud against the franchise.¹⁵ While such lawsuits were unlikely to prevent the relocation, they represented an effort by season ticket holders to recoup

6. See Turco & Ostrosky, *supra* note 1 (noting five NFL franchise relocations from 1990 to 1999).

7. See *id.* (listing those NFL cities losing franchises between 1990 and 1999).

8. See *id.* (listing those NFL cities acquiring franchises between 1990 to 1999).

9. See Monmaney, *supra* note 2 (reporting depression and anxiety of many Cleveland Browns' fans following team's relocation).

10. See *id.* (characterizing relocation of Cleveland Browns as loss of emotional safe harbor for citizens of Cleveland).

11. *Id.* (quoting comments of Cleveland Psychological Association director on collective psyche of city after relocation of Browns).

12. See *Beder v. Cleveland Browns, Inc.*, 758 N.E.2d 307, 311 (Ohio Ct. Com. Pl. 2001) (describing emotional outpouring of Cleveland citizens following departure of the Browns), *settling* 717 N.E.2d 716 (Ohio Ct. App. 1998).

13. See Monmaney, *supra* note 2, (providing history of Browns' attendance record in Cleveland).

14. See *Beder*, 717 N.E.2d at 718 (discussing claims presented by season ticket holders against relocating NFL franchise); see also Monmaney, *supra* note 2 (reporting existence of lawsuit against Cleveland Browns following relocation). For an overview of the legal action, see *infra* notes 45-112 and accompanying text.

15. See *Beder*, 717 N.E.2d at 718 (listing breach of contract and fraud as claims against Cleveland Browns); see also *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115 (Cal. Ct. App. 1999) (discussing claims presented by season ticket holders against relocating NFL franchise).

losses suffered incident to the relocation of the franchise, such as decreased value of remaining tickets and the loss of the right to renew season tickets in the future.¹⁶

Crucial to such claims of loss is the notion that the management of relocating franchises dissembles to protect their bank accounts.¹⁷ Consider the following hypothetical scenario: The management of franchise X creates a smokescreen of commitment and permanence in one city while planning to relocate to another city in the near future. This smokescreen prevents losses to the franchise, such as decreased ticket sales, concessions and merchandising, which would certainly follow if the fan-base was cognizant of the impending relocation. In the meantime, loyal and dedicated fans continue to provide emotional and economic support (including the purchase of season tickets with the hope of future renewal) only to find themselves abandoned when the smokescreen clears.

This Comment focuses on claims brought by season ticket holders against relocating NFL franchises. Part II of this Comment discusses the characteristics of season tickets and personal seat licenses.¹⁸ Part III presents a brief legal background.¹⁹ Part IV of this Comment presents the traditional breach of contract and fraud arguments proffered by season ticket holders, narrowing to consideration of *Beder v. Cleveland Browns, Inc.*²⁰ Part V proposes an alternative to the traditional season ticket holder arguments by suggesting season tickets (more specifically, personal seat licenses) constitute securities pursuant to the definition of “investment contract” provided in *SEC v. W.J. Howey Co.*²¹ Finally, Part VI of this

16. See *Beder*, 717 N.E.2d at 718 (listing claims of plaintiffs); see also *Charpentier*, 89 Cal. Rptr. 2d at 117 (listing claims of plaintiffs).

17. See *Beder*, 717 N.E.2d at 722 (reporting plaintiff's suggestion Cleveland Browns planned to move to Baltimore long before announcement in November 1995); see also *Charpentier*, 89 Cal. Rptr. 2d at 122 n.9 (mentioning lease escape clause obtained and research, discussion, and consolidation done by franchise several years before relocation).

18. For a discussion of characteristics of season tickets and personal seat licenses, see *infra* notes 23-34 and accompanying text.

19. For a discussion of the brief legal background, see *infra* notes 35-44 and accompanying text.

20. 717 N.E.2d 716 (Ohio Ct. App. 1998) (containing season ticket holder arguments based on contract law and fraud). For a discussion of breach of contract and fraud arguments by season ticket holders, see *infra* notes 45-112 and accompanying text.

21. 328 U.S. 293 (1946) (defining four-prong “investment contract” test). For a discussion of alternative arguments, see *infra* notes 117-214 and accompanying text.

Comment explores the impact the federal securities law will have on NFL franchises and season ticket holders.²²

II. WHAT ARE SEASON TICKETS & PERSONAL SEAT LICENSES?

On the most basic level, the purchase of a season ticket package entitles one to a specified seat for all home games played by a respective franchise at their home stadium.²³ The typical NFL season ticket plan is ten games — two preseason games and eight regular season games.²⁴ Season ticket prices vary from city to city and according to seat location within a particular stadium.²⁵ For example, the St. Louis Rams season ticket prices ranged from \$400 — \$750 for the 2003 NFL season, while the Chicago Bears season ticket prices ranged from \$450 — \$650 for the 2003 NFL season.²⁶

Various NFL franchises now require the one-time purchase of a personal seat license for certain premium seats as a prerequisite to the purchase of season tickets for current and future seasons.²⁷ In

22. For a discussion of the impact of securities laws, see *infra* notes 215-32 and accompanying text.

23. See *Ticket Policies and Procedures*, CLEVELAND BROWNS.COM, at <http://www.clevelandbrowns.com/tickets/policies.php> (last visited Mar. 18, 2004) [hereinafter Cleveland Browns] (presenting overview of season ticket ownership, including policies and procedures related to: payment, conditions of purchase, seat location, lost/stolen tickets, waiting lists, and group tickets).

24. See *Season Tickets & PSLs (Personal Seat Licenses)*, OFFICIAL WEBSITE ST. LOUIS RAMS, at <http://news.stlouisrams.com/tickets/psls> (last visited Mar. 18, 2004) [hereinafter St. Louis Rams] (noting season tickets include ten games).

25. See *id.* (displaying variation in season ticket prices); see also *Season Ticket & Waiting List Information*, CHICAGO BEARS, at http://www.chicagobears.com/facility/index.cfm?cont_id=70208&nav_key=sta&subnav_key=nsf&show_rail=false (last visited Mar. 18, 2004) [hereinafter Chicago Bears] (displaying variation in season ticket prices).

26. See St. Louis Rams, *supra* note 24, (listing season ticket prices); see also Chicago Bears, *supra* note 25 (listing season ticket prices).

27. See Don Walker, *Seat licenses may be Packers' pass to future*, MILWAUKEE J. SENTINEL ONLINE (last modified Oct. 8, 1999), at <http://www.jsonline.com/packer/news/oct99/seat09100899.asp> (noting ten NFL teams used seat licenses as of 1999); see also Cleveland Browns, *supra* note 23, (discussing personal seat licenses and policies concerning personal seat license). A personal seat license confers an array of permanent rights related to ticket purchases for a specified seat. See St. Louis Rams, *supra* note 24 (listing season ticket prices). It should also be noted a personal seat license differs from the traditional notion of tickets as revocable licenses. See *Seahawks Ticket Policies & Information*, SEAHAWKS.COM, at <http://www.seahawks.com/TicketPol.aspx> (last visited Mar. 18, 2004) [hereinafter Seahawks] (characterizing individual game tickets as revocable license). While an individual game ticket is a revocable license, the personal seat license grants more permanent rights. See *id.* (granting broad discretion for revocation of individual game ticket). The Seahawks may revoke an individual game ticket "for reasons including, but not limited to the following: failure to meet payment deadlines, drunk or disorderly conduct, scalping or resale of tickets, stadium construction and reconfiguration of seating areas and ownerships disputes." *Id.*

Chicago, forty-five percent of all Bears' seats require the purchase of a personal seat license.²⁸ The personal seat license is attractive to NFL franchises for the revenue boost it generates, and it is also attractive to season ticket holders for the broader set of rights it conveys.²⁹ While the specific rights vary from franchise to franchise, most personal seat licenses include the right to renew a season ticket package on an annual basis, the right of first refusal for play-off tickets, and the right to transfer the personal seat license.³⁰ Some personal seat licenses expire after a specified period of time, while others continue indefinitely.³¹ In addition, most personal seat licenses will terminate if the holder fails to purchase season tickets pursuant to the license.³² Similar to season tickets, the price of a personal seat license, when initially purchased from a franchise, varies from city to city and according to seat location within a particular stadium.³³ Moreover, the right of transferability granted to personal seat license purchasers indicates that the open market price can rise and fall over time with the fortunes of a respective franchise.³⁴

28. See Chicago Bears, *supra* note 25 (providing breakdown of personal seat license versus standard seating).

29. See St. Louis Rams, *supra* note 24 (listing personal seat license prices and rights of personal seat license holders); see also Ralph C. Anzivino, *Reorganization of the Professional Sports Franchise*, 12 MARQ. SPORTS L.J. 9, 53 (2001) (noting personal seat licenses may be sold, exchanged, or bequeathed to future generations); Babington & Denlinger, *supra* note 2, at D1 (noting Cleveland Browns entitled to sell \$80 million worth in new stadium deal with Baltimore).

30. See St. Louis Rams, *supra* note 24 (presenting the rights of the personal seat license holder). When purchasing from the St. Louis Rams:

A PSL Owner will enjoy the following benefits:

[t]he exclusive right to purchase season tickets to all ten (two preseason and eight regular season) Rams home games[,] [t]he right of first refusal to purchase tickets for Rams home playoff game[,] PSLs are fully transferable[,] and PSL owners are eligible to participate in the Relocation Program which provides an opportunity to improve the location of your seat within your price category, upgrade to a higher price category, or purchase additional seats on your account subject to availability.

Id.

31. See Anzivino, *supra* note 29, at 52-53 (mentioning time limits on personal seat licenses); see also Cleveland Browns, *supra* note 23 (placing no limit on duration of personal seat license).

32. See Anzivino, *supra* note 29, at 52-53 (describing operation of personal seat licenses).

33. See St. Louis Rams, *supra* note 24 (listing price of personal seat license for 2003 when purchased from St. Louis Rams); see also Walker, *supra* note 27, at ¶¶ 9, 11 (noting personal seat license prices for Pittsburgh Steelers ranged from \$500 to \$2,700 in 1999 and personal seat license prices for Cleveland Browns ranged from \$250 to \$1,500 in same year).

34. See St. Louis Rams, *supra* note 24 (noting personal seat license purchaser may fully transfer); see also Anzivino, *supra* note 29, at 53 (noting personal seat licenses may be sold).

III. LEGAL BACKGROUND

Disputes involving season tickets or personal seat licenses generally implicate principles of contract law.³⁵ The essential elements of a contract include “an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent[,] and legality of object and of consideration.” There must also be a “meeting of the minds” for the contract to be enforced.³⁶ Once the existence of a contract has been established, claimants may raise the possibility of breach.³⁷

Some disputes involving season tickets or personal seat licenses also implicate principles of fraud.³⁸ The essential “elements of fraud are (1) a false representation concerning a fact, (2) knowledge of the falsity of the representation or utter disregard for its truthfulness, (3) intent to induce reliance upon the representation, (4) justifiable reliance upon the representation, and (5) injury proximately caused by the reliance.”³⁹

This Comment proposes federal securities laws as an alternative context in which to consider season ticket or personal seat license disputes.⁴⁰ The Securities Act of 1933 and the Securities Exchange Act of 1934 center on providing adequate investment information and protection, including private suits for any sale of securities running afoul of their provisions.⁴¹ Congress defined the term “security” broadly to include the term “investment contract,” in addition to more traditional securities, such as stocks, bonds, and debentures.⁴² Congress failed to provide a specific definition of the term “investment contract,” but case law has defined the term as

35. See *Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716, 720 (Ohio Ct. App. 1998) (discussing principles of contract law).

36. See *Kostelnik v. Helper*, 770 N.E.2d 58, 61 (Ohio 2002) (quoting *Perlmutter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409, 414 (N.D. Ohio 1976)).

37. See *Beder*, 717 N.E.2d at 721 (finding existence of contract as necessary antecedent to discussion of breach).

38. See *id.* at 722-23 (discussing fraud in context of season ticket dispute).

39. See *id.* at 722 (listing elements of fraud).

40. For a discussion of federal securities laws as an alternative context, see *infra* notes 215-32 and accompanying text.

41. See 15 U.S.C. §§ 77k-77l (2000) (permitting partial and complete recovery for liabilities arising out of false registration statement, prospectus, or communications); see also 15 U.S.C. §§ 78j-78r (2000) (discussing regulation of fraudulent schemes and liability for misleading statements).

42. See 15 U.S.C. § 77b (2000) (listing “investment contract” under definition of “security”); see also H.R. REP. NO. 73-85, at 11 (1933) (asserting “many types of instruments . . . in our commercial world fall within the ordinary concept of a security”). For a discussion of the term “investment contract,” see *infra* note 43 and accompanying text.

follows: “[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”⁴³ If season tickets or personal seat licenses fall within the above definition, the federal securities laws apply.⁴⁴

IV. TRADITIONAL CLAIMS OF SEASON TICKET HOLDERS

Season ticket holders have consistently appealed to principles of contract law when filing claims against relocating professional sports franchises.⁴⁵ These claims have asserted that a contract existed between the season ticket holder and the franchise based upon the purchase of tickets, that the contract included an option or a right to purchase season tickets in the future, that the contract included a covenant of good faith and fair dealing, and that the franchise has breached the contract — the covenants and clauses therein — by relocating to a new city.⁴⁶ In the alternative, season ticket holders have asserted that franchises are restricted by the existence of implied contracts or the doctrine of promissory estoppel.⁴⁷

Failing the principles of contract law, season ticket holders have resorted to claims that a relocating franchise acted fraudulently.⁴⁸ Based upon these assorted claims, season ticket holders have sought both declaratory and injunctive relief, compensatory and punitive damages and attorney fees.⁴⁹

43. See *Sec. & Exch. Comm’n v. W.J. Howey, Co.*, 328 U.S. 293, 298-99 (articulating test for investment contract).

44. See *id.* at 299 (applying definition to non-traditional investment schemes).

45. See *Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (rejecting claim of breach of contract); see also *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115 (Cal. Ct. App. 1999) (rejecting claim of breach of contract).

46. See *Beder*, 717 N.E.2d at 720-21 (discussing contract-based claims raised by season ticket holders); see also *Charpentier*, 89 Cal. Rptr. 2d at 118-19 (discussing contract based claims raised by season ticket holders).

47. See *Beder*, 717 N.E.2d at 720 (dismissing claim of promissory estoppel due to existence of contract between Cleveland Browns and season ticket holders).

48. See *id.* at 722-23 (discussing fraud); see also *Charpentier*, 89 Cal. Rptr. 2d at 119 (discussing fraud). See generally *Strauss v. Long Island Sports, Inc.*, 60 A.2d 501 (N.Y. App. Div. 1978) (addressing season ticket holders’ class-action against franchise where preseason promotion of team centered upon Julius Erving, who was subsequently traded to another franchise shortly after season ticket sales were over).

49. See *Beder*, 717 N.E.2d at 720 (listing types of damages); see also *Charpentier*, 89 Cal. Rptr. 2d at 118 (listing types of damages). In *Beder*, the trial court awarded monetary damages calculated to reflect the “diminished value” of Cleveland Browns season tickets following the November 1995 announcement that the team

The case of *Beder v. Cleveland Browns, Inc.*⁵⁰ provides a vehicle by which to explore the substantive merit of the aforementioned claims. In *Beder*, the Court of Appeals for the Eighth District of Ohio ("Eighth District") reviewed the lower court's grant of summary judgment for the Browns on all the season ticket holders' claims.⁵¹ Although the case was fraught with procedural questions, the Eighth District devoted significant attention to the substantive claims of season ticket holders.⁵² To date, few cases provide the same detailed coverage of season ticket holders' claims as *Beder*. Moreover, the *Beder* court alludes to and analogizes from legal precedent spanning the nation.⁵³ This diversity of precedent makes *Beder* a valuable tool for all franchises and season ticket holders.⁵⁴

A. The Facts in *Beder*

In *Beder*, season ticket holders filed numerous claims against the Browns and related companies after the franchise announced its decision to move to Baltimore.⁵⁵ The common pleas court of

would relocate to Baltimore. See *Beder*, 717 N.E.2d at 720. The Eighth District noted allowing claims for diminished value would validate any and all claims by disgruntled ticket holders. See *id.* at 721.

50. 717 N.E. 2d 716 (Ohio Ct. App. 1998); see also *Charpentier*, 89 Cal. Rptr. 2d 115 (Cal. Ct. App. 1999). *Charpentier v. Los Angeles Rams Football Co., Inc.* also addresses the substantive merit of season ticket holders' claims against relocating franchises. See *id.*

51. See *Beder*, 717 N.E.2d at 718 (providing procedural history); see also *Charpentier*, 89 Cal. Rptr. 2d at 117 (providing procedural history in class-action against Los Angeles Rams). In *Charpentier*, the Court of Appeals for the Fourth District of California ("Fourth District") reviewed the lower court's dismissal for failure to state a cause of action against the Los Angeles Rams. See *id.* at 117.

52. See *Beder*, 717 N.E.2d at 720-23 (discussing substantive merit of claims under breach of contract, promissory estoppel, implied contract, fraud, and Consumer Sales Practices Act); see also *Charpentier*, 89 Cal. Rptr. 2d at 120-25 (discussing substantive merit of class-action against Los Angeles Rams). In *Charpentier*, the Fourth District discussed the substantive merit of claims under breach of contract, implied promise, and fraud. See *id.* at 120-25.

53. See *Beder*, 717 N.E.2d at 720-23 (citing legal precedent from Ohio, New York, Illinois, and Washington in discussion of breach of contract, promissory estoppel, Consumer Sales Practices Act, and fraud).

54. See *id.* (citing legal precedent from across the nation, including *Seko Air Freight, Inc. v. Transworld Sys., Inc.*, 22 F.3d 773 (7th Cir. 1994), *Strauss v. Long Island Sports, Inc.*, 60 A.2d 501 (N.Y. App. Div. 1978), *Bailey v. Meister Brau, Inc.*, 378 F.Supp. 869 (N.D. Ill. 1973), and *Wilson v. Whinery*, 678 P.2d 354 (Wash. Ct. App. 1984)).

55. See *Beder*, 717 N.E.2d at 718 (stating facts). The Eighth District of the Court of Appeals of Ohio ("Eighth District") addresses the underlying motivation of the season ticket holders' claims by stating the announcement "immediately stunned the city of Cleveland and clearly disappointed the loyal and dedicated fans." *Id.*; see also *Charpentier*, 89 Cal. Rptr. 2d at 117-18 (stating facts surrounding relocation of Los Angeles Rams to St. Louis). In *Charpentier*, season ticket holders

Cuyahoga County consolidated the claims into a class action and granted summary judgment in favor of the Browns on all claims.⁵⁶ On appeal, the Eighth District considered the procedural and substantive appropriateness of the lower court's grant of summary judgment to the Browns.⁵⁷

B. The Existence of a Contract in *Beder*

The Eighth District found the purchase of a season ticket package was a contract between the Cleveland Browns and the purchasing season ticket holder.⁵⁸ In finding a contract, the Eighth District stated, "all the requirements of a contract were present."⁵⁹ Although the court failed to lay out the precise elements of a contract and how those elements were satisfied under the facts presented, the court cited *Stern v. Cleveland Browns Football Club, Inc.*,⁶⁰ an earlier appellate decision from the Eleventh District of Ohio ("Eleventh District"), holding the purchase of season tickets to be a contract.⁶¹

filed suit following the Los Angeles Rams announcement the franchise would relocate to St. Louis following the 1994 season. *See id.*

56. *See Beder*, 717 N.E.2d at 718 (providing procedural history). The Eighth District later maintained the grant of summary judgment on limited issues, reversed the grant of summary judgment on others, and remanded the later issues to the court of common pleas. *See id.* at 725. Both the season ticket holders and the Browns argued the court of common pleas erred in the consolidation of the claims as a class action. *See id.* at 723. The Eighth District ruled the court of common pleas did not abuse its discretion and upheld the manner in which the claims were consolidated. *See id.* at 725. In Ohio, a trial court has broad discretion when evaluating whether a class action may be maintained. *See Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 447 (Ohio 1998). Moreover, abuse of discretion will only be found where the trial court maintains an "unreasonable, arbitrary, or unconscionable" attitude. *Blakemore v. Blakemore*, 450 N.E.2d 1140, 1142 (Ohio 1983).

57. *See Beder*, 717 N.E.2d at 718 (providing Eighth District's ruling). The Eighth District partially affirmed and partially reversed on both procedural and substantive issues. *See id.* at 725. On substantive issues, the Eighth District agreed the claim for breach of contract based upon diminished value was without merit. *See id.* at 720. The Eighth District reversed by finding relocation by the Cleveland Browns to Baltimore destroyed the right of first refusal created in season ticket holders by virtue of the season ticket purchase, which is a contract. *See id.* at 721.

58. *See id.* at 720 (finding contract and opening door to breach of contract claims by season ticket holders).

59. *Id.* Although the Eighth District asserted all the elements of a contract were present in the purchase of Cleveland Browns' season tickets, the court failed to elaborate on those elements. *See id.* For a discussion of contract law in Ohio, see *supra* notes 35-37 and accompanying text.

60. No. 95-L-196, 1996 Ohio App. LEXIS 5802 (Ohio Ct. App. Dec. 20, 1996) (finding purchase of season ticket package a contract).

61. *See Beder*, 717 N.E.2d at 720 (citing *Stern*, 1996 Ohio App. LEXIS 5802, at *4).

In *Stern*, the Eleventh District struggled with the question of whether advertisements promoting Browns' season tickets constituted an offer to form a contract with the franchise.⁶² As a general premise, advertisements are construed only as invitations to bargain, not as offers themselves.⁶³ The *Stern* court, however, carved out an exception to this general premise by calling upon similar exceptions in Virginia and Minnesota.⁶⁴ The Eleventh District stated, "[c]ourts have recognized an exception to this rule when an advertisement is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract."⁶⁵ Applying the reasoning of *Stern*, the Eighth District found a contract had been formed between the purchasing season ticket holders and the Browns.⁶⁶

By concluding that a contract existed, the Eighth District opened the door to consideration of the breach of contract claim.⁶⁷

C. Breach of Contract in *Beder*

The season ticket holders in *Beder* asserted two distinct breach of contract claims.⁶⁸ First, they claimed the value of their tickets for the remainder of the 1995 season diminished following the announcement that the Browns planned to relocate to Baltimore.⁶⁹

62. See *Stern*, 1996 Ohio App. LEXIS 5802, at *4 (addressing Cleveland Browns' argument that "renewal package mailing" was nothing more than advertisement, not offer).

63. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 4.7 (4th ed. 1990) (distinguishing preliminary negotiations from offers).

64. See *Stern*, 1996 Ohio App. LEXIS 5802, at *4 (citing *Chang v. First Colonial Sav. Bank*, 410 S.E.2d 928, 930 (Va. 1991) and *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 691 (Minn. 1957) as acknowledging exception to general rule that advertisements are not offers).

65. *Id.* (providing rule for advertisements as offers to form contracts).

66. See *Beder*, 717 N.E.2d at 720 (finding a contract). The Eighth District supplied the following reasoning to support its finding that the advertisement was indeed an offer:

The renewal package was specific in its terms including price, quantity of tickets, and the time appellee had to submit his payment. Once appellee submitted his check for the price of the season tickets, no other action was required by *Stern*. Furthermore, the renewal package mailed to appellee was not a general advertisement to the public, but instead was specifically sent to *Stern* to allow him to renew his seats for the Browns' 1995 season.

Id.

67. See *id.* at 720 (stating existence of a contract mandates remedy in breach of contract if such remedy is substantiated by claimants).

68. See *id.* (enumerating breach of contract claims proffered by season ticket holders).

69. See *id.* (discussing breach of contract for diminished value). The season ticket holders based the breach of contract claim for diminished value on the no-

Second, the season ticket holders claimed they were denied their right of first refusal to purchase future season tickets.⁷⁰

The Eighth District found the breach of contract claim for diminished value without merit.⁷¹ The court asserted that the Browns' poor performance following the November 1995 announcement of their relocation could not serve as a basis for breach of contract.⁷² The Eighth District reasoned that performance level of an NFL franchise is a matter of opinion and is not valid grounds for breach of contract.⁷³ Honoring such a claim, the court stated, would set an overly subjective precedent, and such a

tion that the level of play before the announcement was NFL-caliber, but the level of play following the announcement was below NFL-caliber. *See id.*; *see also* *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 118 (Cal. Ct. App. 1999) (presenting season ticket holders claim for breach of implied covenant of good faith and fair dealing). In *Charpentier*, the season ticket holders claimed the Los Angeles Rams breached an implied covenant of good faith and fair dealing by purposefully fielding a "poor football team" for the years 1990 through 1994. *See id.* The season ticket holders alleged the Rams' campaign of bad faith included allowing "star players" to leave while simultaneously increasing ticket prices in order to reap greater profits. *See id.* at 124. The Fourth District rejected this argument and stated the following:

[P]laintiff did not buy the right to watch a good team or to have enlightened (in his opinion) management decisions made In short, the Rams were not beholden to plaintiff to operate as he might have preferred, nor was the team required to repay local fans' loyalty by declining other opportunities. Plaintiff's recourse was to give up on the team when he felt it had given up on him.

Id.

70. *See Beder*, 717 N.E.2d at 720 (listing claims of season ticket holders).

71. *See id.* at 720-21 (relying on *Stern v. Cleveland Browns Football Club, Inc.*, No. 95-L-196, 1996 Ohio App. LEXIS 5802 (Ohio Ct. App. Dec. 20, 1996)). The *Beder* court, in part, relied upon the reasoning of the *Stern* court to find the breach of contract claim for diminished value without merit. *See id.*

72. *See id.* at 720 (relying upon logic supplied in *Seko Air Freight, Inc. v. Transworld Sys., Inc.*, 22 F.3d 773 (7th Cir. 1994)). *Seko Air Freight* ("Seko") signed a contract with Transworld Systems a debt collector, for the collection of certain debts. *Seko Air Freight, Inc. v. Transworld Sys., Inc.*, 22 F.3d 773, 774 (7th Cir. 1994). Seko included an initial payment of \$50,000 to Transworld Systems upon signing the contract. *See id.* Yet, Seko never submitted a single request for debt collection services to Transworld Systems pursuant to the contract. *See id.* In fact, Seko terminated the contract before exercising a single contractual right and asked for their money to be returned. *See id.* Transworld Systems refused, and, subsequently, Seko filed suit. *See id.* The court used the following series of analogies to support Transworld's denial of the \$50,000 refund:

Consider too the purchaser of season tickets for a baseball team. That the Chicago Cubs turn out to be the doormat of the National League would not entitle the ticket holder to a refund for the remaining games, any more than the star tenor's laryngitis entitles the opera goer to a refund when the understudy takes over the role.

Id.

73. *See Beder*, 717 N.E.2d at 721 (characterizing breach of contract claims for diminished value as "subjective and unreasonable").

precedent could lead to a myriad of litigation concerning disgruntled ticket holders in a variety of entertainment forums.⁷⁴ Thus, the Eighth District affirmed the grant of summary judgment in favor of the Browns on the issue of breach of contract for diminished value.⁷⁵

Next, the Eighth District held the denial of right of first refusal was a valid breach of contract claim.⁷⁶ As an initial matter, the court defined the right of first refusal as "a preemptive right requiring the owner to offer the property first to the holder of the right."⁷⁷ The right of first refusal existed as a contractual right because the Browns' "1995 Fan Guide" explicitly granted season ticket holders rights; specifically, the right to the "same seats for an entire season, including right of renewal for next season."⁷⁸

74. *See id.* at 721 (rejecting breach of contract claim for diminished value as too subjective and unworkable). The court stated, "[t]o allow recovery under such a theory would enable any ticket holder not satisfied with the performance of whatever entertainment the ticket procured to seek a refund for such a subjective and unreasonable response." *Id.*

75. *See id.* (affirming grant of summary judgment); *see also* *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 125 (Cal. Ct. App. 1999) (affirming lower court's dismissal of season ticket holders' claim franchise acted in bad faith by fielding poor football team).

76. *See Beder*, 717 N.E.2d at 721 (finding Cleveland Browns violated season ticket holders' right of first refusal).

77. *Id.* (citing *Stratman v. Sheetz*, 573 N.E.2d 776, 778 (Ohio Ct. App. 1989)). The Eighth District also differentiated a right of first refusal from an option. *See id.* The court stated a right of first refusal "differs from an option because the grantee of a right of first refusal cannot compel the owner to sell the property as the grantee can with an option." *Id.*

78. *Stern v. Cleveland Browns Football Club, Inc.*, No. 95-L-196, 1996 Ohio App. LEXIS 5802, at *1, n.3 (Ohio Ct. App. Dec. 20, 1996)); *see also Charpentier*, 89 Cal. Rptr. 2d at 117 (listing terms of Los Angeles Rams season ticket renewal form). The Los Angeles Rams season ticket renewal form included the following provisions:

YOUR SEASON RESERVATION IS VALUABLE

1. You have the privilege to renew reserved seat locations for the upcoming season.
2. You may also purchase reserved seat locations for Divisional and Conference Playoff games played at Anaheim Stadium.

IMPORTANT CONDITIONS OF TICKET PURCHASE

1. The name on the first line of the front-side address box is the company or person with the renewal privilege.
2. The renewal privilege contained in the purchase is NOT TRANSFERABLE and ownership of the seat locations is not implied.
3. NO CANCELLATIONS will be accepted or refunds made on Season Reservations after June 1.
4. *It is understood that all reserved seat locations are subject to final approval by the Los Angeles Rams Football Company.*

Id. at 117-18.

The Browns argued that only they could trigger the right of first refusal by offering season tickets for sale.⁷⁹ The franchise contended that because they planned to move to Baltimore and were no longer offering season tickets for sale in Cleveland, they had never triggered the season ticket holders' right of first refusal.⁸⁰

The season ticket holders countered by reference to the principle of condition precedent.⁸¹ This principle renders a contract enforceable only after a certain condition has been fulfilled.⁸² In this instance, the condition awaiting fulfillment was the Browns' offering season ticket packages for sale.⁸³

The season ticket holders' argument for a "condition precedent" rested upon the notion the Browns destroyed any possibility of satisfying the condition.⁸⁴ Particularly, the season ticket holders sought to enforce the following standard: "[W]hen the enforceability of a contract 'depends upon a condition precedent, one cannot avoid his liability by making the performance of the condition precedent impossible, or by preventing it.'"⁸⁵

The Eighth District accepted the season ticket holders' argument based upon the principle of condition precedent.⁸⁶ In find-

79. *See Beder*, 717 N.E.2d at 721 (presenting Browns' argument against breach of contract for denial of right of first refusal).

80. *See id.* (presenting Cleveland Browns' argument against breach of contract for denial of right of first refusal).

81. *See id.* (considering season ticket holders' argument for breach of contract for denial of right of first refusal).

82. *See id.* (defining contractual principle of condition precedent). In Ohio, a condition precedent is defined as "the happening of some event, or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties." *Mumaw v. W. & S. Life Ins. Co.*, 119 N.E. 132, 135 (Ohio 1917).

83. *See Beder*, 717 N.E.2d at 721 (defining scope of condition precedent in dispute between Browns and disgruntled season ticket holders).

84. *See id.* (introducing case law which undergirds contractual principle of condition precedent).

85. *Id.* (quoting *Suter v. Farmers' Fertilizer Co.*, 126 N.E. 304, 306 (Ohio 1919)). In *Suter v. Farmers' Fertilizer Co.*, the Supreme Court of Ohio held where defendant had entered into contract with plaintiff, the formation of a subsequent contract by defendant with a third party failed to overcome defendant's liability to plaintiff under the original contract. *See* 126 N.E. 304, 306 (Ohio 1919).

86. *See Beder*, 717 N.E.2d at 721 ("[W]hile the right of first refusal is conditioned upon the Browns' desiring to sell season tickets for the 1996 season . . . the Browns [effectively] destroyed the opportunity to exercise this right . . ."); *see also* *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115 (Cal. Ct. App. 1999) (addressing issue of whether relocating Los Angeles Rams to St. Louis broke any contractual promises). In *Charpentier*, the court stated, "[p]laintiff cannot reasonably claim the moving of the team itself broke any promise. Just because a team has played for years in a particular location and has always done something a particular way does not mean that it must always do so." *Id.* at 120.

ing that the Browns destroyed any opportunity to exercise the right of first refusal, the court stated the "only reason they did not offer the tickets for sale was because of the team's decision to move to Baltimore."⁸⁷ Thus, the Eighth District denied the grant of summary judgment to the Cleveland Browns on the issue of breach of contract for denial of the right of first refusal.⁸⁸ The matter was remanded to the Cuyahoga County common pleas court.⁸⁹

Collateral to the breach of contract claims, the Eighth District easily rejected the season ticket holders' claims of implied contract and promissory estoppel.⁹⁰ The court reasoned the existence of an express contract precluded any consideration of claims under the doctrines of promissory estoppel and implied contract.⁹¹

D. Fraud in *Beder*

In *Beder*, the season ticket holders submitted a claim of fraud.⁹² Because most elements of fraud were clearly present in *Beder*, the

87. *Beder*, 717 N.E.2d at 721 (finding trial court erred). The Eighth District stated:

Thus, we find that the trial court erred in determining, as a matter of law, that the Browns were entitled to summary judgment on this issue to the extent that appellants bargained for a season ticket package that included a right of first refusal to purchase the next season's tickets and they were prevented from exercising that right because of the conduct of the Browns.

Id.

88. *See id.* at 721-22 (denying grant of summary judgment for breach of contract for denial of right of first refusal because Browns destroyed the opportunity to exercise right).

89. *See id.* at 721, 725 (remanding matter to common pleas court).

90. *See id.* at 720 (rejecting claims of implied contract and promissory estoppel); *see also Charpentier*, 89 Cal. Rptr. 2d at 120 (finding no implied contract existed). In *Charpentier*, because the franchise failed to explicitly promise it would never relocate, the season ticket holders' were precluded from asserting an implied contract existed based upon such a promise. *See id.*

91. *See Beder*, 717 N.E.2d at 720 (citing *Cincinnati v. Cincinnati Reds*, 483 N.E.2d 1181, 1184-85 (Ohio Ct. App. 1984)). The Eighth District reversed "to the extent that the trial court granted [summary] judgment in [the Browns'] favor as a matter of law on appellants' claim for promissory estoppel." *Id.* In *Cincinnati v. Cincinnati Reds*, the Ohio Court of Appeals for the First District considered the City of Cincinnati's claim of entitlement to recover lease payments contingent on the playing of games in Riverfront Stadium even though the games were canceled because the Cincinnati Reds were on strike. *See* 483 N.E.2d 1181, 1183-84 (Ohio Ct. App. 1984). The city argued for the existence of an implied contract, but the court stated no implied contract exists in relation to any matter expressly covered by the written terms of the lease. *See id.* at 1184.

92. *See Beder*, 717 N.E.2d at 722 (introducing season ticket holders' claim of fraud). For a discussion of elements of fraud in Ohio, *see supra* notes 38-39 and accompanying text.

Eighth District's analysis of the fraud claim was limited to whether statements in a news article can serve as the basis of a fraud claim.⁹³

The season ticket holders' claim of fraud rested upon two news articles.⁹⁴ In the news articles, the Cleveland Browns majority owner, Art Modell, plainly stated his family would never relocate the franchise.⁹⁵ Because the news articles pre-date the November 1995 announcement that the Browns would relocate, an undeniable incongruence existed between the course the Browns declared they would follow and the course the franchise actually followed.⁹⁶ The season ticket holders claimed the incongruence existed by design, as the statements of Art Modell were crafted to induce ticket sales when a decrease in sales would have been the result had the Browns divulged their knowledge of the pending relocation.⁹⁷ Further, the season ticket holders claimed they indeed relied upon the statements in the purchase of season tickets.⁹⁸

93. *See id.* at 722-23 (exploring chronological facts to determine when Browns knew of potential move to Baltimore and discussing feasibility of fraud claim based on statements in news article).

94. *See id.* at 722 (introducing factual basis for season ticket holders claim of fraud against Cleveland Browns).

95. *See id.* The Eighth District transcribed the relevant portions of the newspaper articles in question:

Art Modell, in an interview last week with Plain Dealer editors and reporters, vowed the team will stay in Cleveland as long as his family owns it. And he said the franchise is not for sale, either.

Art Modell's no-sale vow was conditional.

'The team's not for sale. However, if I find it economically impossible for me to compete, not only with 29 other teams in the NFL but with the [Cleveland] Cavaliers and the [Cleveland] Indians for those disposable dollars, then the story might change,' Modell said.

Later in the same article, Modell is quoted as further saying:

'I'm not about to rape this city as others in my league and others have done (to other cities),' he said.

'You'll never hear me say, "If I don't get this I'm moving." You can go to press on that one. I couldn't live with myself if I did that,' he said.

Id.

96. *See id.* at 722 (noting newspaper articles in question pre-date November 1995 announcement concerning relocation of the Cleveland Browns).

97. *See Beder*, 717 N.E.2d at 723 (stating appellants claimed "the representations contained in the news articles were false and that the Browns knew they were false when made"); *see also* *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 122 n.9 (Cal. Ct. App. 1999) (bypassing question of truth until question of duty to present truth is resolved). In *Charpentier*, the Fourth District questioned whether the Los Angeles Rams had an affirmative duty to present truthful information to the season ticket holders. *See id.* The Fourth District left this determination to the jury, as the court was limited to consideration of whether the season ticket holders had stated a cause of action. *See id.*

98. *See Beder*, 717 N.E.2d at 723 (stating season ticket holders claim statements of Art Modell induced them to purchase season tickets); *see also Charpentier*, 89 Cal. Rptr. 2d at 123 (applying "reasonable fan" standard to determine whether reliance on misleading statements justified in context of relocating franchises). The

The Browns stated two defenses to the season ticket holders' claim of fraud.⁹⁹ First, the Browns argued the statements of Art Modell were true when made and, also, the statements were conditional.¹⁰⁰ Arguing for the truth of the statements, the Browns introduced Art Modell's testimony, taken at deposition, that the first meeting between the franchise and Baltimore city officials was September 1995.¹⁰¹ Because the first contact between the Browns and Baltimore occurred as late as September 1995, the Browns claimed the statements contained in the news article were true when made.¹⁰² Art Modell clearly hedged his position on the sale of the franchise by stating, "[I]f I find it economically impossible for me to compete . . . then the story might change."¹⁰³ No such language, however, was attached to Art Modell's statement concerning relocation of the franchise.¹⁰⁴

Second, the Browns argued a fraud claim based on statements appearing in a news article is unfair because "defendant had less than complete control."¹⁰⁵

Fourth District articulated the "reasonable fan" standard as follows: "Whether a reasonable fan deciding to purchase season tickets would attach weight to representations concerning a team's moving prospects . . ." *Id.* The jury in *Charpentier* answered the query in the affirmative, reasoning most fans would have "cut their losses in 1994" if they knew "the Rams were planning to decamp in 1995." *Id.*

99. *See Beder*, 717 N.E.2d at 722-23 (listing defenses of Cleveland Browns to season ticket holders' claim of fraud).

100. *See id.* at 723 (presenting argument of Cleveland Browns that statements of majority owner, Art Modell, were true when made, as well as conditional). The Browns contended statements in the article fail to demonstrate fraud because Modell had no control over the article. *See id.* It was also argued the statements were true and conditional when made. *See id.*

101. *See id.* at 722 (discussing deposition testimony of Cleveland Browns majority owner, Art Modell). The Browns emphasized the fact that the deposition testimony was taken "several months after appellants purchased their tickets." *Id.*

102. *See id.* at 723 ("The Browns, on the other hand, contend that the statements were true when made and that the statements themselves were conditional.").

103. *See id.* at 722 (quoting news articles entered into controversy by fraud claims of the season ticket holders). For further discussion of contents of news articles, see *supra* note 95 and accompanying text.

104. *See Beder*, 717 N.E.2d at 722 (noting that only "no sale vow was conditional"). For a further discussion of contents of news articles, see *supra* note 95 and accompanying text.

105. *See id.* at 722-23 (presenting Browns argument against fraud based on statements reported in news article). In arguing against the claim of fraud, the Browns relied on *Schwartz v. Novo Industri, A/S*, 658 F. Supp. 795, 799 (S.D.N.Y. 1987). *See id.* In *Schwartz*, a New York district court addressed a claim of securities fraud based upon statements by a corporation president in an investment newspaper article. *See Schwartz*, 658 F. Supp. at 797 (S.D.N.Y. 1987). The Browns' reliance on *Schwartz* was misplaced as the case dealt with the federal securities fraud under the Securities and Exchange Act of 1934. *See id.* The statutory analysis of federal securities regulation in *Schwartz* does not apply to the season ticket holders' claim

The Eighth District was unconvinced by the Browns' defense.¹⁰⁶ The Browns had referred to a "longstanding struggle with the city" in a document submitted to NFL Commissioner Paul Tagliabue on November 4, 1995.¹⁰⁷ By acknowledging a "longstanding struggle with the city," the court noted, the franchise itself undermined the truthfulness of Art Modell's statements in the news articles and at deposition.¹⁰⁸

The Eighth District also rejected the Browns' contention that statements in a news article cannot serve as the basis for a fraud claim.¹⁰⁹ The court stated that while the Browns lacked control over the reporter, they clearly maintained control over Art Modell.¹¹⁰ The statements of the majority owner of a professional sports franchise, the court continued, can clearly serve as the basis for a claim of fraud.¹¹¹

Subsequently, the Eighth District found summary judgment was inappropriately granted on the season ticket holders' claim of fraud.¹¹²

E. The Settlement in *Beder*

Three years after the Eighth District remanded certain claims of the Browns season ticket holders for consideration in the Cuyahoga County common pleas court, the class members settled

under principles of common law fraud. *See Beder*, 717 N.E.2d at 722. For a general overview of when the federal securities framework is applicable to claims by season ticket holders, see *infra* notes 117-214 and accompanying text.

106. *See Beder*, 717 N.E.2d at 723 (finding an issue of fact existed despite arguments of Cleveland Browns that lower court appropriately granted summary judgment).

107. *See id.* (describing contents of document submitted to NFL). The document the Browns submitted to the NFL was entitled "Notice and Statement of Reasons of the Cleveland Browns Supporting Relocation of Franchise to Baltimore" and was submitted in support of the relocation of the franchise. *See id.*

108. *See id.* The court stated, "In that document, the Browns outline a long-standing struggle with the city on the viability of the Browns remaining in Cleveland. This document, in conjunction with the news articles stating the opposite, creates an issue of fact precluding summary judgment." *Id.*

109. *See id.* (citing *In re Columbia Sec. Litig.*, 747 F. Supp. 237, 245 (S.D.N.Y. 1990)). The Eighth District asserted it is customary for owners and managers of NFL franchises to communicate with potential ticket purchasers through the media, and, therefore, the contents of news articles may serve as probative evidence of fraud. *See id.*

110. *See id.* at 723 (noting Browns controlled Art Modell).

111. *See Beder*, 717 N.E.2d at 723 (stating professional sports franchise is liable for conduct of its owner).

112. *See id.* (rejecting claim of summary judgment).

the lawsuit.¹¹³ Under the agreement, each class member was entitled to fifty dollars.¹¹⁴ Compared with the price of an NFL season ticket package, this fifty-dollar settlement payment is but a pittance of total expenditures by the average Browns' season ticket holder.¹¹⁵ The meager sum reflects the failure of breach of contract and fraud claims to provide sufficient legal force and economic leverage against relocating franchises.¹¹⁶

V. FEDERAL SECURITIES LAWS & SEASON TICKET HOLDERS

The protections afforded by federal securities laws provide significant legal force and economic leverage to investors.¹¹⁷ The Securities Act of 1933 and the Securities Exchange Act of 1934 center on providing adequate investment information, protecting the integrity of markets, and enabling investors to recover damages for any sale or purchase of securities running afoul of applicable provisions.¹¹⁸

Considering the meager sum of fifty dollars obtained by Browns' season ticket holders in *Beder*, the broad protection of federal securities laws, if applicable, would have provided much greater legal force and economic leverage.¹¹⁹ Certainly, recovery of

113. See *Beder v. Cleveland Browns, Inc.*, 758 N.E.2d 307, 311 (Ohio Ct. Com. Pl. 2001) (approving settlement agreement between class members and Cleveland Browns).

114. See *id.* (presenting financial components of settlement agreement).

115. See *id.* (listing fifty dollars as settlement payment); see also Chicago Bears, *supra* note 23 (listing season ticket prices ranging from four hundred and fifty dollars to seven hundred dollars); St. Louis Rams, *supra* note 24 (listing season ticket prices ranging from four hundred dollars to seven hundred and fifty dollars).

116. See *Beder*, 717 N.E.2d at 718 (listing claims of plaintiffs); see also *Charpentier v. L.A. Rams Football Co., Inc.*, 89 Cal. Rptr. 2d 115, 117 (listing claims of plaintiffs).

117. 15 U.S.C. §§ 77e-77g, 77k-77l (1997 & Supp. 2003) (setting forth prohibitions, requirements, and penalties pursuant to Securities Act of 1933); see also 15 U.S.C. § 78b (2003) (describing scope and necessity of regulation in Securities Exchange Act of 1934).

118. §§ 77e-77g, 77k-77l (setting forth disclosure requirements as well as permitting partial and complete recovery for liabilities arising out of failure to register securities and false registration statements, prospectus, or communications); see also 15 U.S.C. §§ 78j, 78r (1997 & Supp. 2003) (discussing liability for fraudulent practices and misleading statements or omissions).

119. See §§ 77k-77l (allowing victims of security violations "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."); see also § 78b (discussing broad protection needed for investors). See *Beder*, 758 N.E.2d at 311 (stating settlement agreement worth fifty dollars to each member of class action).

the entire purchase price of season tickets or personal seat license is much more desirable than a fifty dollar fraction of that price.

Before such a result can be reached, however, one must determine that season tickets or personal seat licenses are securities for purposes of The Securities Act of 1933 and the Securities Exchange Act of 1934.¹²⁰ This appears to be an unwieldy proposition in the well-developed securities climate of our time.¹²¹ Nevertheless, the application of federal securities laws to NFL franchises and season ticket holders, especially those holding a personal seat license, is a distinct possibility.¹²²

To better grasp the legitimacy of this application, it is necessary to consider a general overview of the federal securities framework, the definition of the term "security," and the application of this definition to season ticket sales.

A. Overview of the Securities Framework

The Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") combine to form a mandatory disclosure system enforced by the Securities and Exchange Commission ("SEC") to meet the unique informational needs of investors.¹²³ The 1933 Act regulates issuer transactions or "the sales of securities by the issuer to investors."¹²⁴ The 1934 Act regulates

120. 15 U.S.C. § 77b(a)(1) (1997 & Supp. 2003) (defining term "security" as "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness . . . investment contract . . ."); *see also* 15 U.S.C. § 78c(a)(10) (1997 & Supp. 2003) (defining term "security" as "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness . . . investment contract . . .").

121. *See* JAMES D. COX ET AL., *SECURITIES REGULATION* 1-13 (Richard A. Epstein et al. eds., 3d ed. 2001) (presenting legal and institutional framework of federal securities laws).

122. *See* *Sec. & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (providing flexible definition of security).

123. *See* Cox, *supra* note 121, at 3-5 (noting Securities Act of 1933 and Securities Exchange Act of 1934 were response to market collapse of October 1929 and Great Depression). The 1933 Act creates a system of mandatory disclosure for companies offering securities to the public and ensures compliance by authorizing suits for rescission or damages against statutory sellers who violate the Act. *See* §§ 77e-77g, 77k-77l. The 1934 Act creates a system of mandatory disclosure and polices the secondary trading markets for fraudulent schemes or misleading statements of material fact. *See* 15 U.S.C. §§ 78j, 78m, 78o (1997 & Supp. 2003).

124. *See* Cox, *supra* note 121, at 1-4 ("The Act's disclosure demands apply to public offerings of securities that occur through the process of 'registering' such an offering with Securities and Exchange Commission.").

trading transactions or “the selling of outstanding securities among investors.”¹²⁵

Under the 1933 Act, issuers must file an effective registration statement and distribute a prospectus before the sale or purchase of any security is deemed lawful.¹²⁶ Generally, to receive SEC approval, the registration statement and prospectus must include a description of the issuer’s business, an overview of management, an overview of capital structure, disclosure of financial information, analysis of financial information, and the purpose, amount, and net proceeds of the subject offering.¹²⁷ These documents are designed to provide protection to investors by supplying vital information.¹²⁸

A sale or offer for sale of securities, in the absence of an effective registration statement or prospectus, runs afoul of the 1933 Act.¹²⁹ Under the 1933 Act, the violating issuer is strictly liable to investors who may receive a complete rescission of the purchase price or damages if they have already sold their securities.¹³⁰

If the 1933 Act applied to the sale of season tickets by NFL franchises, season ticket holders would receive the protection of the registration statement and prospectus, as well as strict liability for failure to comply.¹³¹ In other words, the 1933 Act would require respective NFL franchises to report their financial status and other material data, including plans to relocate the franchise.¹³² This

125. *Id.* at 2-6 (noting dramatic effect of market crash of October 1929 and Great Depression on value of outstanding securities and secondary trading markets).

126. See §§ 77e-77g (setting forth prohibitions and requirements pursuant to 1933 Act); see also Cox, *supra* note 121, at 117 (asserting status of security is gateway to federal securities regulation, specifically registration, prospectus, and antifraud provisions).

127. See §§ 77g, 77z-3; see also Cox, *supra* note 121, at 4 (discussing registration and prospectus requirements). In § 77g, Congress sets forth the information requirements of the registration by cross-reference to § 77z-3 and Schedule A. See § 77g. Schedule A provides enumerated information requirements that must be present in any effective registration statement. See § 77z-3.

128. See Cox, *supra* note 121, at 1 (noting securities laws designed to meet informational needs of investor).

129. See §§ 77e, 77k-77l (setting forth prohibitions, requirements, and penalties pursuant to 1933 Act).

130. See §§ 77e, 77k-77l (setting forth requirement of registration and prospectus, as well as liabilities for failure to comply under 1933 Act). Specifically, § 77e states that prior to the filing of a registration statement “[i]t shall be unlawful for any person . . . to offer to sell or offer to buy . . . any security, unless a registration statement has been filed as to such security.” § 77e.

131. See §§ 77e-77f, 77k-77l (setting forth prohibition on offers to sell and offers to buy securities until compliance with registration and prospectus requirements, as well as listing liability pursuant to 1933 Act).

132. See §§ 77e-77g, 77z-3 (requiring disclosure of material information, including company-specific and transaction-specific information).

would prevent a franchise from claiming loyalty to one city today, and relocating to another tomorrow.¹³³ Even if such a smokescreen were initially successful, the disclosure requirements of the 1933 Act would require NFL franchises to report future plans to relocate subject to the threat of strict liability and complete rescission.¹³⁴

Before the requirements of the 1933 Act can be applied to the sale and purchase of season tickets or personal seat licenses, however, it is necessary to conclude that season tickets fit into the definition of “security” under the 1933 Act.¹³⁵

B. What is a Security?

Notes, stocks, and bonds are traditional securities and are easily recognizable as such.¹³⁶ Other financial instruments may fall outside the category of traditional securities, yet, under appropriate circumstances, these unconventional instruments may be categorized as securities.¹³⁷

Congress defined the term “security” broadly to include the term “investment contract.”¹³⁸ The 1933 Act fails to provide a statutory definition of “investment contract,” as do relevant legislative reports.¹³⁹ Thus, the term has spawned extensive litigation, but jurisprudence has yielded only sparse clarity and unwieldy tests.¹⁴⁰

133. See §§ 77e-77g, 77k-77l (requiring disclosure of material information and imposing strict liability for failure to supply such information in connection with sale of securities).

134. See §§ 77e, 77k-77l (prohibiting the sale of securities in absence of effective registration statement and prospectus and setting forth liabilities under 1933 Act).

135. See § 77b. The 1933 Act defines “security” as follows: ‘security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security . . . or, in general, any interest or instrument commonly known as a ‘security’ . . .

Id.

136. *Id.* (listing financial instruments defined as securities for purposes of 1933 Act); See also Cox, *supra* note 121, at 117 (dubbing notes, stocks, bonds, debentures, and certificates of deposit as “straight forward” securities).

137. See Cox, *supra* note 121, at 118 (mentioning inclusion of “catchall phrase” in definition of “security” in 1933 Act).

138. § 77b (listing “investment contract” under definition of “security”); see also H.R. REP. NO. 73-85, at 11 (1933) (asserting “many types of instruments . . . in our commercial world fall within the ordinary concept of a security”).

139. See Sec. & Exch. Comm’n v. W.J. Howey Co., 328 U.S. 293, 298 (1946) (discussing history of term “investment contract” where courts broadly construed term to provide full protection to investors).

140. See Cox, *supra* note 121, at 118 (describing history of “investment contract abstraction”). Cox states the investment contract language “has led to a body

The seminal case under "investment contract" jurisprudence is *SEC v. W.J. Howey Co.*¹⁴¹

C. The Facts of *Howey*

In *Howey*, the SEC brought an enforcement action against W.J. Howey Co. ("Howey Company").¹⁴² The SEC contended that by selling land sales contracts for orange groves in Lake County, Florida, the Howey Company violated the 1933 Act.¹⁴³ Specifically, the SEC asserted the land sales contracts were securities and the Howey Company sold these securities with disregard for the registration and prospectus requirements of the 1933 Act.¹⁴⁴

Between February 1, 1941 and May 31, 1943, the Howey Company entered into forty-two land sales contracts.¹⁴⁵ When complete, the land sales contracts conveyed narrow strips of land in a common orange grove by warranty deed.¹⁴⁶ The Howey Company immediately regained control of these strips, however, by encouraging investors to sign a service agreement pursuant to each land sales contract.¹⁴⁷ The service agreement granted the Howey Company control of the land and "full discretion and authority over the cultivation of the crops."¹⁴⁸

In function, investors signing the land sales contract and accompanying service agreement were entitled only to a proportional allocation of net profits derived from the sale of the cumulative orange crop.¹⁴⁹ Save the interest in profits, individuals retained no

of law that is far from settled." *Id.* Cox continues, "[s]uch is the exasperation with the murkiness of existing jurisprudence that some have commented on the 'Supreme Court's apparent inability to comprehend . . . important issues of federal securities regulation.'" *Id.*

141. 328 U.S. 293 (providing test to determine whether financial instrument constitutes "investment contract" for purposes of 1933 Act).

142. *See id.* at 294 (defining scope of enforcement action against W.J. Howey Co.).

143. *See id.* at 295-96 (describing characteristics of land sales contract).

144. *See id.* at 294 (presenting violation of 1933 Act).

145. *See id.* at 295 (providing statistical breakdown of land sales contracts).

146. *See Howey*, 328 U.S. at 295 (describing provisions of land sales contract). The Supreme Court noted, "[t]hese tracts are not separately fenced and the sole indication of several ownership is found in small land marks intelligible only through a plat book record." *Id.*

147. *See id.* at 296 (describing service contract).

148. *See id.* (stating "[f]or a specified fee plus the cost of labor and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops").

149. *See id.* (noting orange crop from forty-two tracts of land corresponding to forty-two signings of land sales contract is pooled and profits are allocated proportionally based on share of ownership). The Supreme Court noted the average purchase pursuant to the land sales contract was 1.33 acres, but some individuals

interest in their tract of land, nor rights to specific fruit grown on their tract of land.¹⁵⁰

Additionally, because most of the signings were non-residents of Florida, the Howey Company utilized “the mails and instrumentalities of interstate commerce” to effectuate the contracts.¹⁵¹ The signings were also induced by the promise of profits.¹⁵²

D. The *Howey* Test

The *Howey* test was an attempt to clear the waters of investment contract jurisprudence, which were still muddy following *SEC v. C.M. Joiner Leasing Corp.*¹⁵³ In *Joiner*, the Supreme Court provided a vague test for the term investment contract: “Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as ‘investment contracts . . .’”¹⁵⁴ The *Joiner* test included terms equally as baffling as “investment contract” and, therefore, did little to resolve the pervasive uncertainty.¹⁵⁵

The Supreme Court designed the *Howey* test to be both broad and narrow.¹⁵⁶ The design provides a flexible framework able to adapt to limitless financial schemes and instruments, such as land sales contracts for orange groves.¹⁵⁷ Yet, the *Howey* test also provides workable boundaries providing certainty to the term “investment contract.”¹⁵⁸

purchased as little as 0.65, 0.7, and 0.73 of an acre. See *id.* at 295. The variation in ownership was reflected in the allocation of profits from the pooling of the orange crop. See *id.* at 296.

150. See *id.* (“[T]hus there is ordinarily no right to specific fruit.”).

151. See *Howey*, 328 U.S. at 297 (noting *Howey* Company admits it used “mails and instrumentalities of interstate commerce”); see also 15 U.S.C. § 77e (2003) (requiring use of interstate commerce before applying 1933 Act).

152. See *Howey*, 328 U.S. at 296 (discussing profits of *Howey* Company). The *Howey* Company represented that in 1943-1944 profits were as high as twenty percent and that greater profits were anticipated in 1944-1945. See *id.*

153. 320 U.S. 344 (1943) (serving as forerunner to *Howey*).

154. *Id.* at 351 (supplying broad and ambiguous test).

155. See Cox, *supra* note 121, at 119-20 (asserting *Joiner* offered “vague but potentially expansive notions of the breadth of the concept”).

156. See *Howey*, 328 U.S. at 299 (discussing need for both flexibility and certainty).

157. See *id.* at 299 (discussing nature of test). The Supreme Court states, “[i]t embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.” *Id.*; see also H.R. REP. NO. 73-85, at 11 (1933) (recognizing many financial instruments as securities).

158. See *Howey*, 328 U.S. at 298-99 (providing limit for application of term “investment contract”).

For a financial instrument to be deemed an investment contract, and, therefore, a security under the 1933 Act, the following test provided in *Howey* must be satisfied: “[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”¹⁵⁹ As articulated, one may derive a four-prong analysis from the *Howey* test.¹⁶⁰ When enumerated, the prongs include: (1) an investment of money, (2) a common enterprise, (3) expectation of profits, and (4) profits derived solely from the efforts of others.¹⁶¹ After *Howey*, any financial instrument falling outside the category of a traditional security may be defined as a security if each prong is satisfied.¹⁶²

E. *Howey*, Season Tickets, and Personal Seat Licenses

1. “Investment of Money”

First, consider the “investment of money” prong. A problematic issue under this prong is the question of investment versus consumption.¹⁶³ In other words, is the purchaser entirely motivated by a potential return or is the purchaser motivated by a desire to consume? In *United Housing Foundation, Inc. v. Forman*,¹⁶⁴ the Supreme Court stated the 1933 Act applies “where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption”¹⁶⁵

The Supreme Court also acknowledged that some investors may obtain financial instruments for the mixed purpose of investment and desire to consume.¹⁶⁶ Because *Forman* was clearly a case

159. *Id.* at 298-99 (articulating test for investment contract).

160. *See Cox, supra* note 121, at 127-47 (distinguishing four prongs of *Howey* test).

161. *See id.* (presenting background of each prong of *Howey* test).

162. *See id.* (presenting *Howey* as current test for investment contract determinations).

163. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) (“[W]hen a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.”); *see also Cox, supra* note 121, at 127 (pondering scenario in which investment is partially motivated by desire to consume).

164. 421 U.S. 837 (ruling stock in co-op apartment not an investment contract for purposes of 1933 Act because of pervasive interest in consumption).

165. *Id.* at 858 (differentiating concern with return of profits and concern with consumption).

166. *See id.* at 854-55 (considering means by which co-op apartment stock held primarily for consumption may also be used to generate return of profits); *see also*

concerning consumption, the Supreme Court never resolved the uncertainty created by questions of mixed purpose.¹⁶⁷ When confronted with mixed motivation, courts have tended to weigh the investment interest against the consumption interest.¹⁶⁸

At first glance, *Forman* appears to preclude any claim that season tickets constitute a security.¹⁶⁹ The significant consumption interest present in the purchase of season tickets suggests there is no “investment of money” as required by the first prong of *Howey*.¹⁷⁰

On this point, however, it is necessary to differentiate between the season ticket and the personal seat license. The purchaser of a season ticket package has obtained little more than a series of revocable licenses for a specified type of entertainment, at a specified time, and in a specified place.¹⁷¹

The personal seat license, however, provides more than a mere right to view entertainment.¹⁷² The personal seat license confers an array of permanent rights related to ticket purchases and is fully transferable, with the ability to be bought and sold in open commerce.¹⁷³ The fact that the personal seat license is fully transferable suggests that a market — or, at least, a trace of — demand, exists for the instrument.¹⁷⁴ Presumably, the activity on this personal seat license market, or the demand for personal seat licenses, is linked to the success or failure of the respective franchise: win-loss record, Super Bowl appearances, free agent signings or losses,

Sec. & Exch. Comm’n v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (finding existence of intrinsic value in investment property, beyond mere expectation of profits, not dispositive).

167. See *Forman*, 421 U.S. at 858 (noting primary motivation of purchasers in *Forman* was consumption).

168. See *Grenader v. Spitz*, 537 F.2d 612 (2d Cir. 1976) (finding availability of profit from shares in cooperative apartment was incidental to consumption interest); see also *Teague v. Bakker*, No. 96-2186, 1998 U.S. App. LEXIS 7079, at *2 (4th Cir. Apr. 8, 1998) (asking whether “investors were attracted primarily by the prospect of acquiring use and not by financial returns on their investment”).

169. See *Forman*, 421 U.S. at 858 (noting securities laws do not apply to purchases motivated by desire to consume).

170. See *Howey*, 328 U.S. at 301 (listing investment of money as first element of an investment contract).

171. See *Seahawks*, *supra* note 27 (characterizing tickets as revocable licenses that may be withdrawn at anytime at sole discretion of franchise).

172. See *Cleveland Browns*, *supra* note 23 (defining rights of personal seat licenses).

173. See *id.* (noting nearly all personal licenses may be transferred freely).

174. See *Anzivino*, *supra* note 29, at 53 (2001) (noting personal seat licenses may be sold, exchanged, or bequeathed to future generations).

and new stadium projects or renovations.¹⁷⁵ This type of fluctuation in the value of a personal seat license is reminiscent of fluctuation in the value of traditional securities.¹⁷⁶ To be sure, there are traces of a consumption interest in the purchase of personal seat licenses.¹⁷⁷ Nevertheless, one can make a strong argument that the purchase of a personal seat license is an “investment of money” in the *Howey* sense.¹⁷⁸

2. “Common Enterprise”

Next, consider the “common enterprise” prong. To constitute a common enterprise under *Howey*, the existence of horizontal commonality is essential.¹⁷⁹ Horizontal commonality is simply defined as the “pooling of investment funds, shared profits, and shared losses” such that it is impossible for “one investor to realize a gain or loss without each other investor gaining or losing proportionately, based upon the amount he invested.”¹⁸⁰

Once again, the aforementioned distinction between season tickets and personal seat licenses is relevant. Funds generated by the sale of season tickets *can never* be pooled as “investment funds” because season tickets fail to constitute an “investment of money” pursuant to the first prong of *Howey*.¹⁸¹ Funds generated by the sale of personal seat licenses, on the other hand, may be pooled as “investment funds” because personal seat licenses *may* constitute an “investment of money” pursuant to the first prong of *Howey*.¹⁸²

The investment funds generated by the sale of personal seat licenses flow to a respective franchise, at which point the funds are pooled and deployed at the discretion of the franchise.¹⁸³ It is then

175. See John Wunderli, *Squeeze Play: The Game of Owners, Cities, Leagues and Congress*, 5 MARQ. SPORTS L.J. 83, 87 (1994) (stating winning percentage direct variable to franchise revenues).

176. See Cox, *supra* note 121, at 17-21 (describing the markets and market forces which shape the fluctuating value of traditional securities).

177. See Anzivino, *supra* note 29, at 53 (noting personal seat licenses inextricably linked to purchase of season tickets).

178. See Sec. & Exch. Comm’n v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (listing first prong of test as investment of money).

179. See Sec. & Exch. Comm’n v. Life Partners, Inc., 87 F.3d 536, 543 (D.C. Cir. 1996) (discussing concept of horizontal commonality); see also Wals v. Fox Hills Dev. Corp., 24 F.3d 1016, 1018 (7th Cir. 1994) (asserting requirement of horizontal commonality comports with 1933 Act).

180. See *Life Partners*, 87 F.3d at 544 (“[I]t is the inter-dependency of the investors that transforms the transaction substantively into a pooled investment.”).

181. See *Howey*, 328 U.S. at 298-99 (listing “common enterprise” requirement).

182. See *id.* (requiring pooling of investment funds for “common enterprise”).

183. See Mildred Wigfall Robinson, *Public Finance of Sports Stadia: Controversial but Permissible . . . Time for Federal Income Tax Relief for State and Local Taxpayers*, 1 VA.

necessary to consider whether the holders of personal seat licenses for a respective franchise share profits and losses.¹⁸⁴ Because the transferability of personal seat licenses suggests some sort of market, market factors, such as win-loss record, Super Bowl appearances, free agent signings or losses, and new stadium projects or renovations, are likely to impact all personal seat license holders equally.¹⁸⁵ Just as the fluctuations of the New York Stock Exchange dictate profits and losses to shareholders, fluctuations on the personal seat license market dictate profits and losses to license holders.¹⁸⁶ This is "common enterprise" under the second prong of *Howey*.¹⁸⁷

3. "Expectation of Profits"

The "expectation of profits" prong is a factual inquiry.¹⁸⁸ Simply stated, it is necessary to examine the representations of the issuer to determine whether the potential investors were led to expect profits.¹⁸⁹

Once again, season tickets and personal seat licenses must be treated individually. In this instance, the inquiry centers on representations of a respective franchise, and such representations diverge concerning season tickets and personal seat licenses.¹⁹⁰

Season ticket packages include a series of tickets each granting the right to view a particular game, but those tickets lose all value once the game has been completed.¹⁹¹ Even if sold before the date of the respective entertainment, resale of tickets is discouraged, es-

SPORTS & ENT. L.J. 135, 144 (2002) (describing revenue streams of NFL franchises and noting revenue from personal seat licenses flows only to franchise). Robinson states, "[i]n the NFL, the home team retains [sixty percent] of gate receipts with the balance going to the league. Importantly, the revenue generated by skyboxes, club seats, and personal seat licenses is not included in this pot." *Id.*

184. See *Life Partners*, 87 F.3d at 543 (listing shared profits and losses as essential to horizontal commonality).

185. See Wunderli, *supra* note 175, at 87 (describing market forces, including winning percentage, in NFL economics).

186. See Cox, *supra* note 121, at 17-21 (describing markets and market forces which shape the fluctuating value of traditional securities).

187. See *Howey*, 328 U.S. at 298-99 (listing "common enterprise" as second component to definition of "investment contract").

188. See *id.* at 296-97 (discussing representations by Howey Company to potential investors concerning expectation of profits). For a discussion of profits in *Howey*, see *supra* note 152.

189. See *Howey*, 328 U.S. at 298-99 (discussing expectation of profits).

190. See *Seahawks*, *supra* note 27; see also *Cleveland Browns*, *supra* note 23 (defining rights of personal seat licenses).

191. See *Seahawks*, *supra* note 27 (characterizing tickets as revocable licenses to view entertainment).

pecially if sold at a price greater than face value.¹⁹² Thus, as franchises discourage attempts to resell, they do not lead purchasers of season tickets to expect profits in the *Howey* sense.¹⁹³

With regard to personal seat licenses, the right of transferability indicates the possibility of profit.¹⁹⁴ The query is focused on the representations of the franchise concerning profits, not the mere possibility of profits.¹⁹⁵ The St. Louis Rams' personal seat license information lists benefits of ownership, but the benefits listed do not explicitly include expectation of profits.¹⁹⁶ Personal seat license information for the Cleveland Browns and the Chicago Bears also fails to include expectation of profits.¹⁹⁷ While official personal seat license documents may fail to include representations leading purchasers to expect profits, it would be difficult to completely exclude the possibility of such representations arising in communications between franchise representatives and purchasers during the sales process.¹⁹⁸

Failing explicit representations, an attempt to argue that franchises implicitly lead purchasers to expect profits by granting the right of transferability fails to resonate with the facts of *Howey*, where investors were explicitly led to expect profits.¹⁹⁹

4. "Solely from the Efforts of Others"

Finally, consider the "solely from the efforts of others" prong. In *SEC v. Glenn W. Turner Enterprises, Inc.*,²⁰⁰ the court determined "solely" was equivalent to predominant or significant efforts of others.²⁰¹

192. See *id.* (noting resale of tickets as grounds for revocation).

193. See *Howey*, 328 U.S. at 298-300 (providing representations concerning profits made by W.J. Howey Co.).

194. See Anzivino, *supra* note 29, at 53 (discussing transferability of personal seat licenses including sale and exchange).

195. See *Howey*, 328 U.S. at 298-99 (noting promoter or third party leads investor to expect profits through their representations).

196. See St. Louis Rams, *supra* note 24 (listing rights conveyed by personal seat license).

197. See Cleveland Browns, *supra* note 23 (defining rights of personal seat licenses); see also Chicago Bears, *supra* note 25 (discussing personal seat licenses).

198. See St. Louis Rams, *supra* note 24 (listing rights conveyed by personal seat license but lacking an explicit statement as to expectation of profits).

199. See *Howey*, 328 U.S. at 296-97 (providing representations concerning profits made by W.J. Howey Co.).

200. 474 F.2d 476 (9th Cir. 1973) (addressing meaning of term "solely" as used in *Howey*).

201. See *id.* at 482 (emphasizing "essential managerial efforts" must lie with promoter where investors play role in such efforts in order for "investment contract" to be present).

Essentially, investors are permitted to play a minor role in the management of an "investment contract," but the predominant efforts must be put forth by the promoter or issuer.²⁰² The *Turner* court asked "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."²⁰³

Respective franchises retain full control over managerial functions, which ultimately determine success or failure.²⁰⁴ In the NFL, success or failure is measured in terms of win-loss record, Super Bowl appearances, free agent signings or losses, and new stadium projects or renovations.²⁰⁵ The respective franchise alone holds the decision-making power with regard to the foregoing factors.²⁰⁶ No managerial duties, whatsoever, are delegated to purchasers of season tickets or personal seat licenses.²⁰⁷ Therefore, as the "essential managerial efforts[,] which affect the failure or success of the enterprise[,] are completely controlled by the respective franchise, the fourth prong of *Howey* is satisfied."²⁰⁸

F. Tying *Howey* Together

The application of *Howey* to season tickets and personal seat licenses reveals the following: (1) season tickets packages are not securities for purposes of the 1933 Act, and (2) personal seat licenses may constitute securities for purposes of the 1933 Act.²⁰⁹

Season tickets are easily extracted from the definition of "investment contract" because consumption, rather than an "investment of money," is the motivation under the first prong of

202. See Cox, *supra* note 121, at 145 (noting "most lower courts have followed the lead of *Turner* . . . and have concluded an investment contract may exist even though there is some investor participation in a venture").

203. See *Turner*, 474 F.2d at 482 (setting forth critical inquiry under "'solely' from the efforts of [others]" prong).

204. See Wunderli, *supra* note 175, at 87 (noting managerial duties of NFL franchise). Wunderli states, "[a]n owner must be considered a businessman first. As such, he wins by maximizing profits, measured by the margin between costs and revenues." *Id.*

205. See *id.* (describing market forces in NFL economics as tied to population size of area in which franchise is located and winning percentage).

206. See *id.* (noting interaction between economic forces and NFL management).

207. See St. Louis Rams, *supra* note 24 (listing rights conveyed by personal seat license but not including grant of any voting or management rights).

208. See *Turner*, 474 F.2d at 482; see also Sec. & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) (listing "solely from the efforts of [others]" as fourth prong of "investment contract").

209. See *id.* (defining "investment contract" using the four-prong analysis).

Howey.²¹⁰ On the other hand, personal seat licenses appear to fulfill the *Howey* definition of "investment contract."²¹¹ The right of transferability tips the scale in favor of investment over consumption.²¹² The funds generated by personal seat licenses are pooled in common enterprise, and management of these funds is predominantly within the control of the franchise.²¹³ The most problematic prong of *Howey* is the "led to expect profits" prong, but nevertheless, this fact-sensitive prong will become operative upon a well-developed record.²¹⁴

VI. IMPACT ON NFL FRANCHISES & SEASON TICKET HOLDERS

The impact of federal securities laws on the NFL and season ticket holders can be divided into three categories: (1) impact season ticket holders *without* personal seat licenses, (2) impact season ticket holders *with* personal seat licenses, and (3) impact on NFL franchises and professional sports franchises generally.

A. Season Ticket Holders *Without* Personal Seat Licenses

Season ticket holders without personal seat license are comparable to the season ticket holders in *Beder*.²¹⁵ These ticket holders are afforded only the meager protection of breach of contract and fraud claims.²¹⁶ As seen in the settlement of *Beder*, these types of claims provide very minimal legal force and economic leverage to ticket holders against a relocating NFL franchise.²¹⁷

210. *See id.* (requiring investment of money in order to find "investment contract").

211. *See id.* (defining investment contract using four-prong analysis).

212. *See* St. Louis Rams, *supra* note 24 (conveying right of transferability to personal seat license holders).

213. *See* Robinson, *supra* note 183, at 143 (describing revenue streams of NFL franchises); *see also* *Howey*, 328 U.S. at 298-99 (including "common enterprise" and "solely from the efforts of [others]" as components of "investment contract"); Wunderli, *supra* note 175, at 87 (noting managerial duties of an NFL franchise).

214. *See* *Howey*, 328 U.S. at 299 (noting fact sensitive nature of "led to expect profits" component of "investment contract").

215. *See* *Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (discussing season ticket holder claims of breach of contract and fraud).

216. *See id.* (demonstrating season ticket holder claims on grounds of breach of contract and fraud provide scant protection).

217. *See* *Beder v. Cleveland Browns, Inc.*, 758 N.E.2d 307, 311 (Ohio Ct. Com. Pl. 2001) (noting recovery of only fifty dollars by season ticket holders).

B. Season Ticket Holders *With* Personal Seat Licenses

Season ticket holders with personal seat licenses possess significant legal force and economic leverage.²¹⁸ If personal seat license holders successfully argue personal seat licenses are securities under *Howey*, the 1933 Act applies.²¹⁹ Thus, an NFL franchise selling personal seat licenses in the absence of an effective registration statement and prospectus would be liable under the 1933 Act.²²⁰ For the personal seat license holder, this means a potential rescission of the entire purchase price of the license.²²¹

C. NFL Franchises and Other Professional Sports Franchises

The 1933 Act would require NFL franchises, or any professional sports franchise selling personal seat licenses, to file a registration statement and include a prospectus with all offers to sell the licenses.²²² Pursuant to these requirements, the financial status and other material data, including plans to relocate the franchise, would become public knowledge subject to materiality inquiry.²²³ These requirements would prevent the very type of behavior re-

218. 15 U.S.C. §§ 77e-77g, 77k-77l (1997 & Supp. 2003) (presenting disclosure requirements and liability provisions of 1933 Act).

219. See 15 U.S.C. §§ 77b (1997 & Supp. 2003) (setting forth definition of "security", including "investment contract" under 1933 Act); see also *Howey*, 328 U.S. at 299 (defining components of "investment contract" under 1933 Act).

220. See §§ 77e, 77l (setting forth registration statement as prerequisite to sale of securities and noting purchaser of unregistered security may recover "consideration paid for such security . . . upon the tender of such security").

221. See § 77l (imposing strict liability upon statutory seller enabling injured purchaser "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security").

222. See §§ 77e-77g (establishing registration statement as prerequisite to sale of securities and listing required contents of registration statement).

223. See §§ 77g, 77z-3 (setting forth information requirements of registration statement by cross-reference to Section 77z-3 and Schedule A). For a discussion of the interaction of § 77g and § 77z-3, see *supra* note 127. To be sure, Schedule A mandates disclosure of only certain material data. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The materiality standard applicable to a franchise's decision to relocate varies according to whether the decision is a historical fact or a contingent or speculative fact. See *id.*; *Basic, Inc. v. Levinson*, 485 U.S. 224, 229 (1988) (adopting probability-magnitude test of *SEC v. Texas Gulp Sulphur*, 401 F.2d 833, 849 (C.A.N.Y. 1968)). A historical fact is "material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to [invest]." *TSC Indus.*, 426 U.S. at 449. It is safe to assume a reasonable season ticket holder or personal seat license holder would consider the relocation of the franchise when deciding how to invest. See *id.* A speculative fact is material where the facts indicate a high probability that the event will occur and where the facts demonstrate that the event will be of great magnitude to the issuer. See *Basic*, 485 U.S. at 988. Where a franchise merely considers the possibility of relocation, the materiality judgment is highly fact-sensitive and difficult to predict. See *id.*

ported in *Beder*.²²⁴ Specifically, the public knowledge established by the requirements of the 1933 Act would prevent a franchise from claiming loyalty to one city today and relocating to another tomorrow.²²⁵

The daunting prospect of disclosure of material events related to relocation presents a significant barrier to franchise movement.²²⁶ With this barrier in place, professional sports franchises would no longer be able to secretly negotiate relocations to greener pastures.²²⁷ Rather, a franchise desiring to relocate would be presented with three options: (1) negotiate and coordinate relocations in a rapid fashion so as to limit revenue losses associated with disclosure of plans to relocate, (2) engage in deliberate and protracted negotiations and face the prospect of significant revenue losses due to disclosure of relocation plans, or (3) terminate sales of personal seat licenses to avoid disclosure under the 1933 Act.²²⁸ The extremity of these options greatly reduces the possibility of franchise relocation, but where a franchise pursues relocation while continuing with the sale of personal seat licenses, the 1933 Act will require disclosure of material proceedings.²²⁹

Breach of contract and fraud claims have failed to provide the necessary economic and financial leverage to prevent relocation of franchises.²³⁰ A finding that personal seat licenses constitute securities, thereby triggering the protection of the 1933 Act, would prevent subterfuge common to the relocation process.²³¹ By bringing relocation proceedings into plain sight, the 1933 Act would provide

224. See *Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (discussing season ticket holder claims of breach of contract and fraud).

225. See §§ 77e-77g, 77k-77l (noting disclosure requirements and liabilities imposed for failure to comply with requirements of 1933 Act).

226. See § 77e ("It shall be unlawful for any person . . . to offer to sell or offer to buy . . . any security, unless a registration statement has been filed as to such security . . .").

227. See §§ 77g, 77z-3 (earmarking extensive list of items for mandatory disclosure by cross-reference to Schedule A).

228. *Id.* (noting disclosure requirements by cross-reference to § 77z-3 (Schedule A)).

229. See § 77e (providing broad protection to investors by requiring registration of securities and distribution of prospectus prior to sale or purchase of securities).

230. See *Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (discussing season ticket holder claims of breach of contract and fraud).

231. See §§ 77c, 77e (noting disclosure requirements apply to "any security," including term, "investment contract").

personal seat license holders with protection where contract and fraud claims have failed.²³²

Mark Levensgood

232. See *Beder*, 717 N.E.2d at 720-22 (highlighting limited reach of breach of contract and fraud claims).

